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No. 00-

IN THE

Supreme Court of the United States

THE NEW PULASKI COMPANY LIMITED PARTNERSHIP,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the finality requirement for the ripeness of a constitutional claim inapplicable where the available variance or exemption process requires a decision by a "legislative/political" body?

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The New Pulaski Company Limited Partnership ("Pulaski") petitions for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW AND STATEMENT OF JURISDICTION

The Fourth Circuit's judgment issued on July 20, 2000. Its decision appears at 2000 WL 1005207 and 2000 U.S. App. LEXIS 17492 and is reprinted in Appendix A. A timely petition for rehearing and for rehearing en banc was denied on August 15, 2000. (Appendix C). This petition is filed within 90 days of that date. Jurisdiction in this Court is founded on 28 U.S.C. § 1254(1).

The District Court's decision in this case was rendered on July 22, 1997. The District Court possessed original jurisdiction over the case pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). Its opinion is reprinted in Appendix B.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Constitutional Provisions:

U.S. Const. Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amendment XIV.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ordinances:

City of Baltimore, Ordinance No. 128, enacted 8/7/92

Due to its length, this ordinance is reproduced in Appendix D at p. 31a.

City of Baltimore, Council Bill No. 846, proposed 5/9/94

Due to its length, this ordinance is reproduced in Appendix E at p. 37a.

STATEMENT OF THE CASE AND DISTRICT COURT JURISDICTION

This is a case in which the Petitioner faithfully adhered to this Court's oft-stated proscription against bringing unripe constitutional claims by first exhausting its remedies under state law through the pursuit of an exemption expressly authorized in the pertinent municipal ordinance. Petitioner brought the action below within the applicable period of limitations following an unsuccessful attempt to secure the exemption, only to be met by an assertion, accepted by the District Court and a divided Court of Appeals, that its claims were barred by limitations because of a novel "political/legislative" exception to the final decision ripeness requirement. Those courts deemed the claims untimely because the exemption process set forth in the ordinance involved in part the political judgment of a municipal legislative body, as opposed to the administrative judgment of an executive agency. The Fourth Circuit's two-to-one decision was rendered over the strong dissent of Judge Karen J. Williams, who described the majority's reasoning as "disingenuous." (App. A at 20a).

The Fourth Circuit's division echoes a previous split by the Court of Appeals for the Ninth Circuit, where two panels disagreed on whether an exception to the ripeness doctrine exists for purportedly "political/legislative" decisions by a state planning agency. *Compare Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 911 F.2d 1321, 1344-47 (9th Cir. 1990) ("*Tahoe I*") *with Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 938 F.2d 153, 157 (9th Cir. 1991) ("*Tahoe II*").

This case is significant because it presents the Court with the opportunity, indeed the necessity, to clarify that there is no "political/legislative" exception to the ripeness final decision doctrine described by this Court in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). If the decision is allowed to stand, the predictable result will be a flood of premature takings and other constitutional claims brought by practitioners understandably reluctant to await the outcome of an exemption process that may or may not be deemed "political" or "legislative" post hoc.

Pulaski commenced this lawsuit in Maryland state court against the Mayor and City Council of Baltimore (the "City") asserting claims, *inter alia*, under 42 U.S.C. § 1983 and seeking substantial damages for the City's unlawful and unconstitutional actions to force the closure of Pulaski's solid waste incinerator located in Baltimore City. Pulaski alleged that the City had violated its rights under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment (and their counterparts in the Maryland state constitution) by imposing and maintaining an illegal moratorium ordinance banning the replacement of its obsolete solid waste incinerator facility.[1]

The City removed the case to the District Court. Although it rejected a number of the City's arguments for dismissal, including arguments going to the merits of Pulaski's claims, the District Court dismissed Pulaski's

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1. The state courts had previously held the moratorium ordinance illegal under Maryland state law. *See Mayor & City Council v. The New Pulaski Company Limited Partnership*, 684 A.2d 888 (Md. Ct. Spec. App. 1996), *cert. denied*, 690 A.2d 523 (Md. 1997).

complaint on limitations grounds, and this decision was affirmed by the Fourth Circuit in a two-to-one decision. (App. A & B).

FACTS MATERIAL TO THE QUESTION PRESENTED

a. Background Facts Concerning the Incinerator.

From 1956 through 1981, the City constructed, owned, and operated a solid waste incinerator (the "Incinerator") located in the city and was responsible for all costs of its operation and maintenance. By 1981, the Incinerator was in dilapidated condition and in desperate need of repair. Because of the tremendous costs involved in upkeep and repair of the Incinerator, the City sold it to Pulaski for $41,000,000 and agreed to pay Pulaski operating fees to fund, *inter alia*, the costs of complying with environmental laws, orders, and regulations.

Although the City initially paid its share of the cost of substantial renovations by Pulaski to bring the Incinerator into compliance with State and federal environmental standards, the City eventually received heavy criticism for its compliance with the Pulaski contract, which opponents condemned as unfair and economically disadvantageous to the City. In 1989, the City learned that its share of retrofit costs for complying with new environmental standards could exceed $40 million, a politically untenable sum. Therefore, the City advised Pulaski that it would not reimburse any expenses for retrofitting the Incinerator, saddling Pulaski with the entire $60 million cost of retrofitting — costs that the City acknowledged were necessary to comply with environmental requirements. In response, Pulaski proposed

to replace its existing Incinerator with a new state-of-the-art, waste-to-energy facility, at no cost to the City, rather than continue the retrofit process.

b. The Incinerator Moratorium and the Express Exemption Procedure.

In January 1992, news of Pulaski's imminent sale of the Incinerator to another company for construction of the new facility was made public, resulting in an even greater outcry by community and environmental activists. Pulaski opponents on the City Council immediately introduced a bill to impose a moratorium on the construction, reconstruction, replacement, or expansion of any incinerator in Baltimore City (the "Moratorium"). (App. D). Moratorium sponsors on the City Council publicly confirmed that their bill was intended to block the sale or replacement of the Incinerator by Pulaski and thus indirectly force its permanent closure due to the prohibitive costs of retrofitting. That way, the City might avoid incurring condemnation damages that some feared could approach $100 million. The Moratorium was enacted on August 8, 1992, effective September 6, 1992.

An amendment to the bill established a procedure whereby an incinerator could be exempted from the Moratorium. That procedure (set forth in § 3(a)) established an administrative process in which a party seeking an exemption was required to obtain from the City's public works director a certification that such action was "necessary to serve the public interest in the efficient, economic, safe, and environmentally sound disposal of solid waste." (App. D). Thereafter, the City Council could consider the request and approve the requested exemption.

c. Pulaski's Pursuit of an Exemption.

Following enactment of the Moratorium, Pulaski sought an exemption. On March 11, 1994, it submitted a detailed study to the City showing the need for a new incinerator. Based on this study and its own internal report, the director of public works approved Pulaski's request for an exemption on May 5, 1994, certifying that replacement of the Incinerator was "necessary to serve the public interest in the efficient, economic, safe, and environmentally sound disposal of solid waste" for the City and its environs. Pursuant to § 3(a), he certified that the City Council should ratify that decision in an ordinance exempting Pulaski from the Moratorium. (App. F).

Four days after this certification, a bill to grant Pulaski an exemption was introduced in the City Council (the "Exemption Bill"). (App. E). Despite an auspicious start — sponsorship by a majority of City Council members and a promise of support by the City's Mayor — the Exemption Bill languished. As a result, in June 1995 Pulaski filed a declaratory judgment action in state court seeking to overturn the Moratorium. The City admitted in its answer filed in that case in September 1995 that the Exemption Bill was then "dead" as a legislative proposition.

In January 1996, the state court entered a declaratory judgment in favor of Pulaski, striking down the Moratorium because it was preempted by state environmental laws. This decision was affirmed on appeal. *See Mayor & City Council v. The New Pulaski Company Limited Partnership*, 684 A.2d 888 (Md. Ct. Spec. App. 1996), *cert. denied*, 690 A.2d 523 (Md. 1997).

On December 31, 1996, Pulaski filed the instant action in the state court alleging that the City's enactment of the Moratorium and failure to grant an exemption amounted to a taking of its property without just compensation and violated Pulaski's rights to substantive due process. The action was filed more than three years after enactment of the Moratorium, but less than three years after the City's director of public works issued his certification recommending approval of the requested exemption.

Following removal by the City to the District Court, the District Court dismissed Pulaski's action, ruling that it was barred by Maryland's three-year statute of limitations. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101. From the Fourth Circuit's divided affirmance, Pulaski submits this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This Petition should be granted to review the Fourth Circuit's establishment of a new "legislative/political" exception to the heretofore clear ripeness guidelines for takings and other constitutional claims in conflict with this Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) and its progeny. *See* Rule 10(c). As a practical matter, the Fourth Circuit's ruling could trigger a cascade of premature constitutional claims by obfuscating one of the clear and well-settled finality guidelines in the abstruse areas of takings jurisprudence and substantive due process.

In *Williamson County*, this Court articulated a two-part ripeness test that a takings plaintiff must satisfy before a court can decide whether a regulation "goes too far" so as to

require the payment of just compensation. This case involves the first prong of that test, which holds that "a claim that the application of government regulations effects a taking is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186.[2]

The reason for the "final decision" requirement analyzed in *Williamson County* is simple. If an aggrieved landowner is permitted to seek relief from the regulation, " 'a mutually acceptable solution might well be reached . . . obviating any need to address the constitutional questions.' " *Id.* at 187 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981)). This Court has consistently applied this final decision ripeness requirement, *see, e.g., Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-34 (1997); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1011-13 (1992), recognizing that although it derives from a blend of prudential concerns and constitutional requirements, it is a jurisdictional prerequisite for bringing a constitutional claim in federal court. *See Suitum*, 520 U.S. at 733 n.7.

In this case, the Fourth Circuit, at the urging of the City, engrafted an unworkable "legislative/political" exception onto the finality requirement based on the allegedly "legislative/political" nature of the exemption procedure in the Moratorium. Specifically, the panel majority concluded that the second portion of the process — enactment of an

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2. The second *Williamson County* requirement, which is not at issue in this case, compels a property owner to exhaust any compensation remedies under state law before litigating its federal claims in federal court. *Id.* at 194-95.

ordinance by the City Council exempting the specified incinerator from the Moratorium pursuant to the certification of the City's public works director — involved an inherently political and unconstrained legislative function that did not constitute an "administrative" remedy that Pulaski was required to have exhausted. *See* Appendix A at pages 10a-12a.

The scant precedential basis for the Fourth Circuit's adoption of the "legislative/political" exception to the final decision requirement was a Ninth Circuit decision, *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 938 F.2d 153, 157 (9th Cir. 1991) ("*Tahoe II*"), that summarily rejected a prior decision involving the same parties and similar issues, *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 911 F.2d 1321, 1344-47 (9th Cir. 1990) ("*Tahoe I*"). *Tahoe II* adopted, without substantive discussion, Judge Kozinski's dissent in *Tahoe I*, which espoused a "legislative/political" exception to the final decision requirement of *Williamson County*. The *Tahoe* cases involved takings claims brought in connection with a regional development plan. The plan ***did not have a variance or exception procedure***, but permitted the regional planning agency to effect changes in its development regulations by amending the plan. Judge Kozinski reasoned in his *Tahoe I* dissent that a legislative decision whether to amend a law is never "final" and, consequently, that the plan provisions allowing citizens to seek an amendment did not create a ripeness bar.

The Fourth Circuit panel adopted Judge Kozinski's reasoning and held that it applied to the exemption procedure of § 3(a) of the Moratorium. Its rationale was that

> [t]he administrative process is, by its nature, finite. At the end of the process the governmental body makes a decision and communicates it to the applicant. The consideration of a proposed ordinance, on the other hand, "requires an exercise of political judgment." And, as Judge Kozinski said, "Political processes are, by their nature, infinite."

(App. A at 9a-10a).

The Fourth Circuit panel decision did not, however, address the majority per curiam opinion in *Tahoe I*, which clearly rejected Judge Kozinski's new exception and criticized it as unsound. The Ninth Circuit panel explained:

> [T]he dissent's attempt to distinguish variances from amendments appears to be based on a fundamental misconception of the process by which such decisions are made. The dissent seems to believe that variances are the province of bureaucrats with green eye-shades who, based solely on the principles of engineering or mathematics, apply slide-rules to citizens' requests; while amendments are considered by Machiavellian politicians who are concerned principally with issuing political decisions that will advance their careers. That is simply not the case. Variance applications frequently raise controversial political questions which engender substantial community division and debate; ultimately, many are decided on broad policy grounds. Moreover, ***such decisions may well be made by the very same legislators who act on***

> ***proposals to amend zoning legislation.*** For example, in the City of Los Angeles, the loser in a zoning variance battle has the right to appeal the decision to the City Council, where the fifteen elected members of that body make the final decision, subject only to the Mayor's right to veto their action. Los Angeles Municipal Code §§ 12.27-12.28. Thus, the distinction relied on by the dissent simply does not exist.

911 F.2d at 1338-39 (emphasis added).

This case poses a far stronger basis for rejecting the "legislative/political" exception than the *Tahoe* cases.

Here, the Moratorium used a hybrid process, delegating initial responsibility for consideration of exemptions to an *administrative agency*, and then giving final authority over that administrative decision to the City Council. In the absence of Pulaski's obtaining the necessary approval from the City agency, with the appropriate certification and statutory findings, the City Council lacked the power to grant an exemption. Accordingly, as Judge Williams recognized, the Moratorium exemption provision contained both administrative and legislative components.

Second, unlike the amorphous right to pursue "an amendment" to regulations at issue in *Tahoe*, Baltimore's exemption process was crafted to function like a zoning variance, allowing individual incinerator operators to seek individual relief for their particular incinerators based on narrowly defined criteria. In administrative law terms, the *Tahoe* decision amendment process falls into the legislative rulemaking category, while the Moratorium exemption

process closely resembles land use variance procedures conducted before legislative bodies sitting in a quasi-administrative or quasi-judicial capacity.

As Judge Williams' dissent portends, there are countless laws, ordinances, and regulations subject to takings and other constitutional claims, with a myriad of factual differences between them, that will make application of a "legislative/political" exception problematical, at best. However, aside from just the factual differences, there are several fundamental reasons for this Court to examine, and resoundingly reject, the Fourth and Ninth Circuits' adoption of a "legislative/political" exception to *Williamson County*'s final decision ripeness requirements.

First, such a distinction is wholly contrary to the basic underpinning of ripeness doctrine, which requires a final decision by whatever "governmental entity" has the discretionary authority to minimize infringement on the property rights in issue. *See Williamson County*, 473 U.S. at 186. To this end, this Court has applied *Williamson County*'s ripeness requirements to a municipal council acting in a legislative and an administrative fashion, like the City Council here. *See Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (takings claims brought by owners of a mobile home park were unripe inasmuch as the park owners had not sought rent increases ***from the city council***). In short, it is the ***existence of*** an exemption procedure, not the body authorized to approve exemptions, that is of paramount importance.

Second, the Fourth Circuit panel's disregard of an express exemption procedure set forth squarely within the Moratorium itself is totally inconsistent with the requirements of *Williamson County* and the long, unbroken

line of cases that both precede and follow it. The decision disregards *Williamson County*'s mandate that a property owner must first seek relief through any exemption or variance procedure and receive a "final decision" from the "government entity" charged with implementing the regulations before a takings claim is ripe for filing in federal court. Instead, the decision simply held that Pulaski's claims were ripe (and therefore limitations began to run) ***upon enactment*** of the Moratorium because the "Moratorium interfered with Pulaski's primary use of its property in concrete ways." This decision hopelessly confuses the time of a taking with the date of finality of the decision for ripeness purposes. For that reason, Judge Williams was correct in characterizing the majority's panel decision as disingenuous.

Third, this Court has never even mentioned a possible exception to the ripeness requirements of *Williamson County* based on the "political" or "legislative" nature of the exemption decision-maker. Instead, in *Suitum*, this Court reiterated that *Williamson County*'s ripeness requirement of finality "responds to the ***high degree of discretion*** characteristically possessed by [local agencies] in softening the strictures of the general regulations they administer." 520 U.S. at 738 (emphasis added). Broad discretionary powers to grant or deny variances and exceptions are commonplace in zoning ordinances. *See Williamson County*, 473 U.S. at 188 & 188 n.9 (at issue in that case were " '[v]ariances [that] ***may*** be granted' " by a local planning commission if the subdivider can show extreme hardship and consistency with the regulatory intent and the commission finds " 'conditions peculiar to the site' ") (emphasis added).

Indeed, as the Ninth Circuit recognized in *Tahoe I*, zoning matters and variances are routinely decided by ordinances approved by legislative bodies. The determination

by the Fourth Circuit in this case that the Moratorium exemption process is legislative because the Moratorium vests the final authority in a legislative body confuses the ordinary for the extraordinary and creates a distinction without a difference — a dangerously unwise one at best.

Finally, the Fourth Circuit's decision, coupled with the Ninth Circuit's decision in *Tahoe II*, will invite an avalanche of premature claims by property owners affected by regulations and ordinances which permit relief by procedures that involve actions by a legislative body, such as a county council. Prudent counsel will need to file constitutional claims before receipt of a final decision on the application of regulations to a particular piece of property, if the exemption process entails actions by a "political" or "legislative" body, such as a city or county council. Otherwise, if they wait for a final decision, they risk facing arguments, as Baltimore City argued in the Fourth Circuit, that the constitutional claims were brought ***both too early and too late!*** (*See* App. A at 21a, fn). Judge William's' dissent was absolutely correct in stating that

> [i]f Pulaski had attempted to bring suit prior to seeking an exemption, ***there is no doubt that a federal court would have considered the action not yet ripe for a judicial determination***. Pulaski correctly would have been sent back to the Director of Public Works to seek approval for an exemption because it had the right and obligation to seek a specific determination of how the Ordinance would affect its property before raising the constitutional takings question.

(App. A at 19a-20a (emphasis added)).

In sum, the Fourth Circuit's adoption of a "legislative/political" exception to the final decision ripeness requirement of *Williamson County* is wholly inconsistent with *Williamson County* and its progeny, as well as the actual exemption provision in the Moratorium. This "legislative/political" exception is an unworkable departure from the heretofore clear ripeness guidelines established by this Court for constitutional claims. It should be reviewed, and rejected, by this Court.

CONCLUSION

A writ of certiorari should therefore be issued in this case to determine whether to establish an amorphous exception to the heretofore clear and unambiguous ripeness requirements in *Williamson County* and its progeny. This Court has repeatedly recognized the confounding nature of takings claims. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty"). The Fourth Circuit's decision in this case and the Ninth Circuit's decision in *Tahoe II* compound that problem by obfuscating one of the few uncomplicated guidelines in ripeness jurisprudence, namely the clear rule that constitutional claims are not ripe, and therefore jurisdictionally defective, until the claimant has received a final decision from the "governmental entity charged with implementing the regulations." *Williamson County*, 473 U.S. at 186.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED JULY 20, 2000

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-2118

THE NEW PULASKI COMPANY LIMITED PARTNERSHIP,
a Maryland Limited Partnership,

Plaintiff-Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
a Municipal Corporation,

Defendant-Appellee.

No. 97-2204

THE NEW PULASKI COMPANY LIMITED PARTNERSHIP,
a Maryland Limited Partnership,

Plaintiff-Appellee,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
a Municipal Corporation,

Defendant-Appellant.

Appendix A

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-97-38-S)

Argued: January 29, 1999

Decided: July 20, 2000

Before WILLIAMS, MICHAEL, and MOTZ,
Circuit Judges.

* * *

OPINION

MICHAEL, Circuit Judge:

The New Pulaski Limited Partnership Company (Pulaski) sued the Mayor and City Council of Baltimore (together, the "City") in Maryland state court, asserting that the City had violated its rights under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment by imposing and maintaining a moratorium ordinance that prevented Pulaski from building a replacement incinerator on its Baltimore property. Although the case was brought mainly under 42 U.S.C. § 1983, Pulaski also relied on provisions in the Maryland Constitution. The City removed the action to federal court, where the judge dismissed Pulaski's complaint on statute-of-limitations grounds. We affirm.

Appendix A

I.

We accept the well-pleaded facts in the complaint and recite them in the light most favorable to Pulaski. *See Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996). The case arises out of the operation of a solid waste incinerator located on Pulaski Highway in Baltimore. The City owned and operated the incinerator for twenty-five years, from 1956 until 1981. On May 6, 1981, the City sold the incinerator to Pulaski for $41 million and leased the associated land to Pulaski for fifty years. As part of the transaction, Pulaski and the City entered into a Waste Disposal Service Agreement (WDSA). The WDSA required Pulaski to provide priority waste disposal service to the City and other local jurisdictions. In return, the City was required to reimburse Pulaski for certain expenses in operating the incinerator, including the costs of complying with environmental laws, orders, and regulations. The WDSA's original term was fifteen years, and the City had options to renew the agreement for up to fifteen additional years.

For the first eleven years the WDSA was in effect, the City paid its prescribed share of environmental compliance costs. Trouble began, however, when the Maryland Department of the Environment (MDE) took steps to force Pulaski to comply with the federal Clean Air Act Amendments of 1990 and the EPA's implementing regulations. Specifically, the MDE ordered Pulaski either to make substantial renovations to the incinerator or to replace it with a new facility. When the City learned that the cost to upgrade the incinerator could exceed $40 million, it balked. In a letter dated May 8, 1992, the City advised Pulaski that

it would "not reimburse any expenses incurred in retro-fitting" the incinerator. With the City refusing to pay its share, Pulaski could not afford to retrofit the existing incinerator. Pulaski therefore proposed an alternative: it would build a new, state-of-the-art (replacement) incinerator on the site that would comply with the new environmental laws and regulations. Pulaski offered to build the replacement facility at no cost to the City, to pay the City a $10 million start-up fee, and to release the City from its obligation to pay a portion of the cost to retrofit the existing incinerator.

Meanwhile, community opposition was mounting against the operation of any incinerator — whether retrofitted or new — at the Pulaski site. The public pressure prompted the Baltimore City Council to enact an ordinance on August 7, 1992, prohibiting construction, reconstruction, replacement, or expansion of any incinerator in the City (the "Moratorium"). The Moratorium provided that the City Council could, by further ordinance, authorize an incinerator project, if it was certified by the Director of Public Works. The Moratorium stated, in pertinent part:

> AN ORDINANCE concerning
>
> A MORATORIUM ON THE CONSTRUCTION OF INCINERATORS
>
> FOR the purpose of imposing a 5-year moratorium on the construction, reconstruction (other than pollution control measures), replacement and expansion of incinerators within Baltimore City;

providing for certification by the Director of Public Works regarding the necessity for certain construction, reconstruction, replacement or expansion, and City Council approval thereof and defining certain terms; providing for an extension of the moratorium under certain circumstances, and providing penalties.

* * *

SEC. 3. AND BE IT FURTHER ORDAINED, That for a period of 5 years subsequent to the date of enactment of this Ordinance:

a. No person shall construct, reconstruct, replace or expand any incinerator in Baltimore City. Provided, however, that if the Director of Public Works certifies in a written report by detail and analysis to the City Council that such construction, reconstruction, replacement or expansion is necessary to serve the public interest in the efficient, economic, safe and environmentally sound disposal of solid waste, the City Council by ordinance may approve such construction, reconstruction, replacement or expansion.

Baltimore, Md., Ordinance No. 128, 1992 Legislative Session (effective Sept. 6, 1992).

After enacting the Moratorium, the City continued to make things difficult for Pulaski. The City cut off shipments

of its trash to Pulaski, interfered with Pulaski's supply of trash from Baltimore County, and denied Pulaski the use of a municipal landfill to dispose of waste ash. The City also delayed making payments due to Pulaski under the WDSA. On December 22, 1993, Pulaski sued the City in the Circuit Court for Baltimore County, seeking (1) a declaratory judgment that the Moratorium was preempted by state law and (2) damages for the City's alleged breach of the WDSA. A Pulaski representative met with the Mayor on January 24, 1994, to discuss settlement of the lawsuit. The Mayor promised Pulaski that he would support an ordinance exempting Pulaski from the Moratorium if Pulaski would withdraw its lawsuit and negotiate an agreement terminating the WDSA. Encouraged by the Mayor's assurances, Pulaski dismissed its lawsuit without prejudice on January 31, 1994, and entered into negotiations with the City to terminate the WDSA.

On March 11, 1994, Pulaski's consultant submitted a report to the Director of Public Works that supported the need for a replacement incinerator. Thereafter, on May 5, 1994, the Director certified to the City Council that a replacement incinerator at the Pulaski site was "necessary to serve the public interest." Four days later, a bill was introduced in the City Council to grant Pulaski an exemption from the Moratorium (the "Exemption Bill"). The Exemption Bill was never submitted to a vote. Indeed, it was not even reported out of committee.

Although the Exemption Bill had languished for an entire year, on May 3, 1995, Pulaski entered into a Settlement Implementation Agreement (the "SIA") with the City

terminating the WDSA. Among other things, the SIA ended the City's obligation to pay Pulaski operating costs, including retrofitting costs, for the old incinerator. Also, Pulaski waived all outstanding contractual claims under the WDSA.

On June 23, 1995, less than two months after signing the SIA, Pulaski filed a second declaratory judgment action in the Circuit Court for Baltimore County seeking to invalidate the Moratorium. On January 5, 1996, that court entered judgment in favor of Pulaski, striking down the Moratorium on the ground that it was preempted by state environmental laws. The Court of Special Appeals of Maryland affirmed, *Baltimore v. New Pulaski Co. Limited Partnership*, 684 A.2d 888 (Md. Ct. Spec. App. 1996), and the State's Court of Appeals denied the City's petition for a writ of certiorari, *Baltimore v. New Pulaski Co. Limited Partnership*, 690 A.2d 523 (Md. 1997).

Pulaski shut down the old incinerator in August of 1995, and it never built a new one. Pulaski contends that the City's obstructive tactics caused delays that prevented Pulaski from building a profitable replacement incinerator. Pulaski filed the case that is now before us in the Circuit Court for Baltimore County on December 31, 1996. Pulaski alleges that the City's imposition of the Moratorium, as well as its failure to pass an ordinance exempting Pulaski from it, (1) amounted to a taking of its property without just compensation in violation of the United States and Maryland Constitutions and (2) violated Pulaski's right to substantive due process under the United States and Maryland Constitutions. The City removed the case to federal court and filed a motion to dismiss on the ground that Pulaski's

claims were time barred. The district court granted the motion, concluding that Pulaski's claims accrued "upon enactment of the moratorium" in 1992 and were thus barred by Maryland's three-year statute of limitations. (Maryland's three-year statute, embodied in Md. Code Ann. Cts. & Jud. Proc. § 5-101, applies to this § 1983 action.) The district court also held that the "continuing wrongs" theory did not operate to toll the statute. Finally, the court held that the City was not equitably estopped from raising the statute of limitations as a defense. Pulaski appeals.

II.

Pulaski argues that the three-year statute of limitations did not begin to run on its "as applied" takings claims until the City Council failed to enact the Exemption Bill. According to Pulaski, the passage of the Moratorium ordinance, which blocked construction of the replacement incinerator, did not trigger the statute. We cannot agree.

When an ordinance is alleged to have effected a taking, the claim accrues when the "ordinance interferes in a clear, concrete fashion with the property's primary use." *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1163 (4th Cir. 1991) (holding that takings claim directed at ordinance restricting off-premises advertising signs accrued on the date of enactment, even though there was a 5-year grace period for nonconforming signs). However, a takings claim is not ripe, and the statute of limitations does not begin to run, unless the property owner has exhausted any available administrative exemption and compensation procedures. *Id.* at 1166. As we noted in *National Advertising*, the need to

determine whether a claim is ripe is required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *See National Advertising*, 947 F.2d at 1166 n.12. In *Williamson* the Supreme Court held that a takings claim remains premature until the governmental entity "has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186 (emphasis added). And, in *National Advertising* we held that *Williamson*'s requirement for a final decision was satisfied upon enactment of an ordinance restricting land use when the ordinance did not contain administrative variance or exemption procedures "through which [property] owners might obtain relief." *National Advertising*, 947 F.2d at 1166.

The question for us is whether the Moratorium contained any true administrative exemption procedures that would have prevented Pulaski's claim from being mature on the effective date of the Moratorium. In answering this question, we must decide whether the process by which City Council considered an exemption ordinance was administrative or legislative. Understanding the process is essential because an administrative "decision denying a variance is final, whereas a [legislative] decision not to [pass] a law never is." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1345 (9th Cir. 1990) (Kozinski, J., dissenting), *relied upon in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 938 F.2d 153, 157 (9th Cir. 1991). Under an administrative exemption process, the decisionmaking body grants or denies an exemption based on established standards that guide the decision. The administrative process is, by its

nature, finite. *See Tahoe-Sierra Preservation Council*, 911 F.2d at 1345. At the end of the process the governmental body makes a decision and communicates it to the applicant. The consideration of a proposed ordinance, on the other hand, "requires an exercise of political judgment." *Id.* And, as Judge Kozinski said,

> Political processes are, by their nature, infinite. A change in the makeup of the legislative body, a shift in the political winds, or even a change in attitude based on further experience or additional wisdom, may be a sufficient reason for a political body to change its mind. . . . There is thus no way for a court to say that a legislative process has come to rest with respect to a [proposed] law.
>
> . . . To require plaintiffs to demonstrate that a governing body has made a final decision about what amendments it will allow is to preclude judicial review altogether, as each day brings a new opportunity for the legislature, in its wisdom, to change the law.

Id. (footnotes omitted).

Here, the Moratorium, which outlawed replacement incinerators (including Pulaski's), permitted the Director of Public Works to certify to the City Council that a replacement incinerator was "necessary to serve the public interest in the efficient, economic, safe and environmentally sound disposal of solid waste." Once the Director made a certification, the City Council could, if it chose, pass an ordinance approving construction of an incinerator. In this case Pulaski submitted

materials to the Director to support the need for a replacement incinerator, and the Director made a certification of need to the City Council. The Exemption Bill was then introduced. Nothing happened thereafter. The bill was never reported out of committee, and it was never brought up for a vote in City Council. No final decision on the possible exemption was ever communicated to Pulaski.

The process for the City Council's consideration of the Exemption Bill was not administrative. Although there were standards for the Director's certification of need, the City Council itself was not subject to any guidelines in deciding whether or when to consider an exemption ordinance. The City Council let the Exemption Bill languish, taking no action at all. That failure to act was the exercise of political judgment. The process was thus legislative, and there was, by definition, no "final decision" on the exemption proposal.

Pulaski argues that its "as applied" takings claim "did not ripen, and therefore for limitations purposes, did not arise or accrue until, at the earliest, September 1995, when the City filed a pleading admitting that the Exemption Bill was 'dead.' " Brief for Appellant at 24. As our discussion above indicates, this contention has no merit. First, filing a pleading admitting that proposed exemption legislation is "dead" is not the same as making a final administrative decision to deny an exemption. Second, Pulaski's argument proves how difficult it would be for courts to determine the exact date on which the passage of an ordinance was no longer possible. Indeed, deciding when proposed legislation is "dead" is virtually impossible. A bill that is pronounced "dead" today may regain life tomorrow, or next week, or next year. Thus, Pulaski's

approach for determining ripeness would bring uncertainty for everyone. Neither property owners nor the government would know for sure when a takings claim had matured.

For all of the foregoing reasons we hold that Pulaski's claim accrued upon the enactment of the Moratorium, for that was when the City interfered with Pulaski's use of its property in a clear, concrete fashion.*

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* The dissent concludes that Pulaski's takings claim accrued on May 5, 1994, when the Director of Public Works took action that was favorable to Pulaski by certifying to the City Council that a replacement incinerator was in the public interest. According to the dissent, the Director's power to certify provides an "administrative component" to the process for seeking an exemption from the Moratorium. *See post* at 15. Further, under the dissent's theory, the Director's certification on May 5, 1994, was a "final decision" under *Williamson County Regional Planning Commission*. It was not a final decision. *Williamson* makes clear that a takings claim is not ripe "until the administrative agency has arrived at a final, definitive position regarding how" it will allow "the particular land in question" to be used. *Williamson*, 473 U.S. at 191. *See also id.* at 186 (stating that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a *final decision* regarding the application of the regulations to the property at issue.") (emphasis added). The Director did not have the authority to make a final decision on whether an exemption ordinance would be enacted. That decision was reserved for the City Council, and it was a decision that would be made through the legislative (or political) process. As the dissent recognizes, "it is difficult for a court to determine when a legislative process is 'final.' " *Post* at 15. For that reason, we must conclude that any taking occurred (and Pulaski's claim arose) when the Moratorium was enacted.

Appendix A

III.

Pulaski's second argument on appeal is that even if its takings claims accrued upon enactment of the Moratorium, the City's continued enforcement of the Moratorium and the City's conduct following the Moratorium's enactment constitute "continuing wrongs" that tolled the limitations period. Again, we disagree. The Moratorium squarely prohibited Pulaski from building a replacement incinerator on its property. Any taking thus occurred when the Moratorium passed. After that (as the following discussion demonstrates), nothing the City did changed the nature of the taking or enlarged its impact.

In *National Advertising Company v. City of Raleigh*, 947 F.2d 1158 (4th Cir. 1991), itself a takings case, we outlined the parameters of the "continuing wrongs" theory. We began by observing that "[a] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *Id.* at 1166 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). We proceeded to apply a two-part analysis to determine whether a continuing wrong had occurred. We examined (1) "the nature of the wrongful conduct and harm alleged" and (2) "[t]he particular policies of the statute of limitations in question." *National Advertising*, 947 F.2d at 1167.

Pulaski's essential allegation of harm is that the Moratorium caused it to lose "the only economically beneficial or productive use of its property." In addition, Pulaski alleges that the following actions by the City were continuing wrongs: (1) threats to initiate condemnation

proceedings against the property, (2) false expressions of support for a replacement incinerator that were designed to lure Pulaski into withdrawing its 1993 lawsuit for damages under the WDSA, (3) cessation of the use of Pulaski's facility for disposal of trash and refusal to allow Pulaski to dispose of ash at a City landfill, (4) bad faith refusal to consider the Exemption Bill, and (5) continuing efforts to defend the Moratorium in litigation initiated by Pulaski.

We will begin the analysis, as *National Advertising* requires, by looking at "the nature of the [continuing] wrongful conduct and harm alleged" by Pulaski. *See National Advertising*, 947 F.2d at 1167. For the harm to be continuing, it must add to the alleged takings injury or otherwise constitute a taking itself. *See id.* Pulaski's first allegation of continuing harm is that the City threatened to start condemnation proceedings after the Moratorium had been enacted. Pulaski acknowledges that the Moratorium caused it to lose the "*only* economically beneficial or productive use of its property." This means that any taking occurred at the time of the Moratorium's enactment. With the property already taken, a later threat of condemnation was not either a taking or the source of additional takings injury. Pulaski's second and third allegations of continuing harm relate to claims that the City interfered with or breached the WDSA, the agreement under which Pulaski incinerated trash for the City. These allegations are contract-related claims, not takings claims. Indeed, Pulaski waived all outstanding contractual claims against the City under the WDSA on May 3, 1995, nearly three years after the Moratorium was passed and one year after the Exemption Bill had been introduced. The fourth allegation, that the City Council refused in bad

faith to consider the Exemption Bill, is also not an allegation of a taking or a takings injury. As we have indicated, the City Council's failure to act on the Exemption Bill was simply the exercise of political judgment. It was not a concrete governmental act that amounted to a taking of property. Pulaski's final allegation of continuing harm is the City's defense of the Moratorium when Pulaski sued to have it invalidated in state court. The City's defense of the Moratorium is simply one of the consequences of the Moratorium's enactment; the defense was "not a separate violation," and it did not add to any takings injury alleged. *See National Advertising*, 947 F.2d at 1167.

Finally, an examination of the "particular policies of the statute of limitations in question," *National Advertising*, 947 F.2d at 1168, supports the conclusion that the continuing wrong exception should not be applied here. In particular, the continuing wrong theory should not be applied to relieve a plaintiff from its duty of reasonable diligence in pursuing its claims. *See id.* at 1168 (citing *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 107 (4th Cir. 1983)). Pulaski was aware of the Moratorium from the time of its enactment. It realized at the time that the Moratorium deprived it of significant beneficial and productive use of its property. Pulaski was in a position to challenge the Moratorium within the three-year statute of limitations, and it should have. There is nothing in statutes-of-limitations policies that require a finding of continuing violation.

IV.

Pulaski's last argument is that the City is equitably estopped from raising the statute of limitations as a defense

to Pulaski's claims. Pulaski's estoppel argument is based on its assertion that the City reneged on its promise to exempt Pulaski from the Moratorium. The district court concluded that this argument was "far too weak to support [an estoppel] bar," noting that Pulaski's "reliance on the shifting sands of political support to overcome popular opposition to its plans hardly justifies it now in raising failure or withdrawal of that support as an estoppel." We also conclude that estoppel is not a bar, and we affirm on the reasoning of the district court. *See The New Pulaski Company Limited Partnership v. Mayor and City Council of Baltimore*, Civ. No. S 97-38, mem. op. at 5-6 (D. Md. July 22, 1997).

V.

Because the 1992 Moratorium interfered with Pulaski's primary use of its property in concrete ways (it could not build a replacement incinerator), the district court was correct to conclude that Pulaski's cause of action arose when the Moratorium was enacted. The district court was also correct to reject Pulaski's continuing wrong and estoppel theories. Because Pulaski's claims were time barred, we affirm the district court's order dismissing Pulaski's complaint. In light of this disposition, it will not be necessary for us to consider the City's cross-appeal.

AFFIRMED

Appendix A

WILLIAMS, Circuit Judge, dissenting:

Despite the fact that Pulaski pursued an exemption to a local zoning ordinance prior to bringing its takings claim in federal court, as required by *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the majority holds that Pulaski's claim is time-barred because its cause of action accrued upon the enactment of the ordinance and Pulaski failed to bring suit within the applicable statute of limitations. Because I believe that the applicable statute of limitations could not begin running until Pulaski at least received notice from the relevant administrative agency regarding its exemption request, I respectfully dissent.

In *Williamson County*, the Supreme Court noted that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. The reason for this requirement is simple: If an aggrieved landowner seeks administrative relief, " 'a mutually acceptable solution might well be reached . . . obviating any need to address the constitutional questions.' " *Id.* at 187 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981)). A takings challenge to the application of a governmental regulation to a specific piece of property is unripe if the regulation provides variance or administrative review procedures through which the aggrieved landowner might obtain relief and the landowner has not yet availed itself of

those procedures. *See National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991). In sum, the ripeness requirement properly forces courts to defer to a local governmental body's grievance procedure before passing judgment. It naturally follows that if an action is not ripe, the applicable statute of limitations cannot begin running. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 687 (9th Cir. 1993); *Biddison v. City of Chicago*, 921 F.2d 724, 728-29 (7th Cir. 1991). In fact, the majority concedes as much. *See ante* at 7.

The City expressly indicated its willingness to suspend the general moratorium on improving or constructing incinerators if the Director of Public Works submitted a written report detailing and analyzing the public interest in specific instances. *See* Baltimore, Md., Ordinance No. 128, 1992 Legislative Session (effective Sept. 6, 1992) (the Ordinance). In good faith, Pulaski followed the procedure outlined in the Ordinance, and, on May 5, 1994, obtained the Director of Public Works's certification that a new Pulaski incinerator was necessary to serve the public interest in the efficient and environmentally sound disposal of solid waste. At that point, the process moved to the Baltimore City Council, as contemplated by the Ordinance. Although a bill that would have exempted Pulaski from the Ordinance (the Exemption Bill) was introduced on or about May 9, 1994, it was never reported out of committee or brought for a vote. In fact, the City, in an answer to Pulaski's declaratory judgment action filed in federal district court on September 14, 1995, admitted that the Exemption Bill was "dead" as a legislative proposition.

Appendix A

Despite Pulaski's efforts to obtain an exemption from the Ordinance, the majority holds that Pulaski should have brought its claim at the time the Ordinance was enacted because the exemption procedure was "legislative" in nature, and, therefore, Pulaski never received a "final decision" on its exemption request. In support of this administrative/legislative distinction, the majority cites *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 911 F.2d 1331, 1345 (9th Cir. 1990) (Kozinski, J., dissenting in part) (*Tahoe I*), *relied upon in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153, 157 (9th Cir. 1991) (*Tahoe II*). *Tahoe I* involved the process by which a regional planning agency could adopt amendments requested by a landowner to a regional development plan. *See Tahoe I*, 911 F.2d at 1336. In concluding that the landowner did not need to ask for an amendment prior to bringing a takings claim, Judge Kozinski reasoned that because deciding whether to amend a law "requires an exercise of political judgment," *id.* at 1345, it is impossible "for a court to say that a legislative process has come to rest with respect to a challenged law," *id.* at 1345-46. The majority's reliance upon *Tahoe I* is not entirely apropos because the exemption procedure in this case involves both an administrative and legislative component. Pulaski was required first to undergo a finite administrative review by the Director of Public Works, and only after the Director of Public Works certified that Pulaski's proposed incinerator was necessary to serve the public interest did the City Council have the authority to approve such construction by ordinance.

That the exemption process includes an administrative component is not an insignificant detail. If Pulaski had

attempted to bring suit prior to seeking an exemption, there is no doubt that a federal court would have considered the action not yet ripe for a judicial determination. Pulaski correctly would have been sent back to the Director of Public Works to seek approval for an exemption because it had the right and obligation to seek a specific determination of how the Ordinance would affect its property before raising the constitutional takings question. *See Williamson County*, 473 U.S. at 186. It is simply disingenuous to hold, as the majority effectively does, that Pulaski knew "or ha[d] reason to know of the injury," *National Advertising Co.*, 947 F.2d at 1162 (internal quotation marks omitted), when it did not even know whether the City would or could grant an exemption in accordance with the Ordinance. Indeed, had the Director of Public Works determined that Pulaski's proposed incinerator was not necessary to serve the public interest, I have no doubt that the majority would conclude that that determination was a "final decision" for purposes of satisfying the ripeness requirement of *Williamson County*. It simply makes no sense to conclude that Pulaski's claim accrued at an earlier time merely because it succeeded in convincing the Director of Public Works that it deserved an exemption from the Ordinance. Recognizing that it is difficult for a court to determine when a legislative process is "final," particularly where the legislature has broad discretion on whether to act, I would hold that Pulaski's claim ripened, and would start the running of the statute of limitations, when the Director of Public Works made its final determination on Pulaski's exemption request.

In sum, I believe that Pulaski's cause of action accrued on May 5, 1994, when the Director of Public Works completed

his analysis and "certified to the City Council that a replacement incinerator at the Pulaski site was necessary to serve the public interest." *Ante* at 5 (internal quotation marks omitted). Because Pulaski filed its suit on December 31, 1996, well within the three-year statutory limit, I would hold that its claim was not time-barred and would reverse the district court's dismissal of Pulaski's claim on this ground.*

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* I agree with the district court that the release executed between the parties does not bar this litigation and that Pulaski stated a claim for purposes of Federal Rule of Civil Procedure 12. Moreover, I am not persuaded by the City's arguments that this case is not ripe (1) because the moratorium was judicially invalidated before Pulaski received a final decision and (2) because it is possible that the City might approve an alternative proposal put forward by Pulaski. The latter argument is mooted by the invalidation of the statute. The first argument does not prevent Pulaski's claim from ripening because the claim asserts that the enactment and enforcement of the moratorium during the several-year time period deprived Pulaski of valuable property that is now unrecoverable.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED JULY 22, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 97-38

THE NEW PULASKI COMPANY
LIMITED PARTNERSHIP

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

MEMORANDUM OPINION

This is a dispute over the City of Baltimore's Moratorium on construction and renovation of certain incinerator facilities. The ordinance creating the moratorium was struck down by the state courts of Maryland on state-law (preemption) grounds in *Baltimore v. New Pulaski*, 112 Md. App. 218 (1996), *cert. denied*, 344 Md. 717 (1997). This suit, removed by the City to this Court, asserts claims of federal and state constitutional violations, *via* 42 U.S.C. §1983, stemming from the moratorium ordinance, to include takings and substantive due process claims. The City has moved to dismiss. The motion has been fully briefed, and no oral argument is needed. Local Rule 105.6, D.Md.

The City's motion will be granted, on the ground that the complaint is barred by limitations.

Appendix B

Before turning to the dispositive point, the Court will briefly address some of the points raised by the City that it deems unpersuasive. The Court cannot say, as a matter of law (and only such a finding would suffice under Rule 12), that the release (SIA) earlier executed between the parties bars this litigation. The release is certainly not so clear as to future claims involving construction or attempted construction of a *new* facility as to allow the Court, as a matter of law, to construe it as barring this suit. In fact, the release consistently speaks in terms of the "existing incinerator," a term that is defined to the exclusion of the term "new incinerator." Thus, if there is indeed a lack of ambiguity in the release, it goes in the other direction from the City's position. And if the agreement is ambiguous, then the Court must take evidence on the parties' intention. In either event, a Rule 12 dismissal on grounds of release would be inappropriate. Also, the City is likely collaterally estopped from raising the release as a bar to claims related to the "new incinerator" by the trial court's rejection of that position in the state case, a ruling from which no appeal was taken.

Moving on to the City's substantive arguments for dismissal, the Court finds that none of them would support a Rule 12(b)(6) dismissal.

First, there is a dispute that cannot be resolved in the context of a motion to dismiss as to whether there has been an interference with property rights sufficient to sustain a cause of action for uncompensated taking under the Fifth and Fourteenth Amendments, as opposed merely to a legitimate exercise of governmental regulatory power over an industry that affects the public's health and welfare. This

is an unsettled area of jurisprudence, in which facts — such as other economically viable uses of the property, to name just one — play a key role, even though the decision as to whether there has been a compensable taking is ultimately one of law, rather than of pure fact. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Thus, the questions raised as to whether there was actually a taking are clearly unsuitable for resolution on the pleadings.

Second, the law of the Fourth Circuit does not bar the pleading of a substantive due process claim here. *Cf. Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995). The Court is not persuaded that the Fourth Circuit would be much swayed by the Ninth Circuit's decision in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc).

Third, the Court is not convinced that the Fourth Circuit would find that the plaintiff's failure to pursue state law remedies for the taking at issue bars direct action under the Fifth and Fourteenth Amendments.

Also, the Court is of the opinion that the case law does not shield the legislation at issue from judicial inquiry in a takings/due process case, given the allegations of the present plaintiff, which must be taken as true in a Rule 12 context, of double-dealing by the enacting municipality. *See, e.g., Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

Turning now to the dispositive issue, the Court finds that any interference with the plaintiff's property right to construct a new facility occurred, if at all, upon the Moratorium's enactment in the summer of 1992, and,

therefore, this action is barred by the three-year limitations period of Maryland law which must be applied to this §1983 suit. *See National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1161 (4th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). The question of when the cause of action accrued, though, is to be decided by federal law. *Id.* at 1162.

In the summer of 1992, when the Moratorium was enacted, it plainly prohibited any construction of a new facility or alteration to the existing facility absent the legislative act of granting, by ordinance, an exception. *Baltimore v. New Pulaski*, 112 Md. App. at 222. At that time, the parties well knew that the old facility could not continue to operate for long, given its problems with meeting air quality standards and the impracticality of a retrofit. *Id.* The Moratorium was enacted as a direct result of political pressure from local opponents of the incinerator. *Id.*

Thus, precisely the injury complained of here — the statutory limitation placed by the City on the plaintiff's use of its property for its desired purpose — occurred on enactment of the ordinance. Such a result is consistent with the Fourth Circuit's approach to a similar issue in *National Advertising*, *supra*. In that case, the Fourth Circuit held that an action under §1983 asserting a takings challenge to an ordinance regulating billboards accrued upon its enactment. The same is true of the ordinance at issue in this case.

It may well be that the parties negotiated for legislative relief from the Moratorium, but the official action of the City causing the harm to the plaintiff — that harm being its inability to construct a new facility or to renovate the failing

old one — occurred when the Moratorium was enacted, not when the relief bill failed or when the existing incinerator was forced to shut down. Thus, under the "ad hoc, factual inquiries" test of *National Advertising*, 947 F.2d at 1163-66, the present plaintiff could have, but did not, mount an "as applied" challenge to the ordinance upon its enactment, and, therefore, the present suit is time-barred, unless there is some escape for the plaintiff from the limitations bar.

As in *National Advertising*, the present plaintiff unconvincingly asserts a "continuing harm" theory to toll the accrual of the action, but, as in *National Advertising*, this Court rejects the effort. Here, as in *National Advertising*, the injurious act occurred upon enactment of the ordinance, 947 F.2d at 1166-68, and neither the prospect of negotiating its way out of the Moratorium nor reliance upon overcoming the political opposition that a legislative exception to the Moratorium was sure to engender excuses the plaintiff from its duty to pursue constitutional challenges with diligence. *Id.* at 1168.

Finally, the plaintiff's argument for raising an equitable estoppel against the City are far too weak to support such a bar, in light of the fact that there is no manifest injustice to the plaintiff from the actions pegged by it as amounting to an equitable estoppel (in its opposition Memorandum at 30). *Cf. Schaefer v. Anne Arundel County, Md.*, 17 F.3d 711 (4th Cir. 1994). The plaintiff is obviously a sophisticated entity, a "power player" in the world where politics and business intersect, and, as such, reliance on the shifting sands of political support to overcome popular opposition to its plans

hardly justifies it now in raising failure or withdrawal of that support as an estoppel.

The Court need not, in view of the above, address the ripeness argument raised by the City.

Finally, it could well be that, were the record fully developed for summary judgment purposes, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 326 n.6 (1986), this case might turn out to be nothing more than the kind of land-use dispute dressed up in constitutional finery that the district courts in this Circuit have been instructed to eschew, *see Sylvia Dev. Corp.*, *supra*, 48 F.3d at 828-29, but it also might be that the plaintiff would have a triable case under §1983 as to one or more of its theories. What is, though, clear at this stage is that its complaint is time-barred.

For the stated reasons, the defendant's motion to dismiss is hereby *GRANTED*. A separate order will be entered accordingly.

s/ Frederic N. Smalkin
Frederic N. Smalkin
U.S. District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. S 97-38

THE NEW PULASKI COMPANY
LIMITED PARTNERSHIP

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

ORDER

For the reasons stated in a Memorandum Opinion of even date herewith, it is, by the Court, this 22nd day of July, 1997, ORDERED:

1. That the defendant's motion to dismiss BE, and it hereby IS, GRANTED;

2. That the present complaint BE, and it hereby IS, DISMISSED, as barred by limitations; and

3. That the Clerk mail copies hereof to counsel.

s/ Frederic N. Smalkin
Frederic N. Smalkin
U.S. District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC DATED AND FILED AUGUST 15, 2000

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2118
CA-97-38-S

THE NEW PULASKI COMPANY LIMITED PARTNERSHIP, a Maryland Limited Partnership

Plaintiff – Appellant

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Municipal Corporation

Defendant – Appellee

No. 97-2204
CA-97-38-S

THE NEW PULASKI COMPANY LIMITED PARTNERSHIP, a Maryland Limited Partnership

Plaintiff – Appellee

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, a Municipal Corporation

Defendant – Appellant

Appendix C

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D — CITY OF BALTIMORE, ORDINANCE NO. 128, ENACTED AUGUST 7, 1992

EXPLANATION: CAPITALS INDICATE ADDED TO EXISTING LAW.
[BRACKETS] indicate matter deleted from existing law.
Underlining indicates amendment to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.

CITY OF BALTIMORE
ORDINANCE NO. 128
(Council Bill No. 54)

AN ORDINANCE concerning

A MORATORIUM ON THE CONSTRUCTION OF INCINERATORS

FOR the purpose of imposing a 5-year moratorium on the construction, reconstruction~~, alteration~~ (other than pollution control measures), replacement and expansion of incinerators within Baltimore City~~,~~; providing for certification by the Director of Public Works regarding the necessity for certain construction, reconstruction, replacement or expansion, and City Council approval thereof and defining certain terms; providing for an extension of the moratorium under certain conditions, and providing penalties.

Appendix D

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That the Mayor and City Council finds that:

The incineration of solid waste produces toxic substances and contributes to air, water and ground pollution, endangering the health and well-being of residents in the area of such facilities.

Large scale incineration of solid waste delays and undermines the implementation of environmentally sound alternatives to burning, such as source reduction, recycling and composting.

A significant amount of recyclable and compostable material that could be removed from the solid waste stream is needlessly burned each year in Baltimore City.

To achieve the State's mandated recycling goals and the City's commitment to the disposal of solid waste through environmentally sound alternatives, such as reduction, recycling, and composting, and to benefit the health and welfare of the residents of the City, the City must temporarily ban the construction, reconstruction~~, alteration~~ (other than pollution control measures), replacement and expansion of incinerators within the City's limits.

A limited ban on the construction or ~~alteration~~ expansion of incinerators will allow the City time to develop and implement safe, economical, and environmentally sound alternatives to the incineration of solid waste, all to the benefit of the health, welfare and economic well-being of the residents of the City of Baltimore.

Appendix D

SEC. 2. AND BE IT FURTHER ORDAINED, That as used in this ordinance, the following definitions apply:

a. "Incinerator" means a solid waste burning facility and includes: 1) a plant that burns solid waste, such as mass-burn, resource recovery and waste-to-energy facilities; and 2) a plant that burns any fuel product derived in whole or in part from solid waste. The term incinerator does not include any boiler, process heater, vent gas burner system, flare, after burner, or vapor incinerator owned and operated by a business for the disposal of the business's by product which is generated on site by that business.

b. "Recyclable material" means material which would otherwise become solid waste, and which may be collected, separated, processed and returned to the economy in the form of raw materials or products.

c. "Solid waste" means garbage, refuse, and other waste products, including solid, liquid, semisolid, or contained gaseous material generated by industry, agriculture, commercial businesses, government and residences, but does not include solid or dissolved material in sewage or in irrigation return flows.

d. "Source reduction" means the reduction of solid waste before it enters the solid waste stream, by methods such as product redesign, materials substitution, materials reuse and packaging restrictions.

e. "Expand" and "expansion" means any change in the incinerator's structure and/or operation that would result in additional burning capacity or capability.

Appendix D

SEC. 3. AND BE IT FURTHER ORDAINED, That for a period of 5 years subsequent to the date of enactment of this Ordinance:

a. ~~The City shall not~~ No person shall construct, reconstruct, ~~alter,~~ replace or expand any incinerator in Baltimore City. Provided, however, that if the Director of Public Works certifies ***in a written report by detail and analysis*** to the City Council that such construction, reconstruction, replacement or expansion is necessary to serve the public interest in the efficient, economic, safe and environmentally sound disposal of solid waste, the City Council by ordinance may approve such construction, reconstruction, replacement or expansion.

~~b. No City office, officer, department, or employee shall accept, process or grant an application for any approval, variance, license or permit for an incinerator in Baltimore City, nor grant a permit for the construction, reconstruction, alteration, replacement or expansion, for the purpose of increasing or providing additional burning capacity or capability of any incinerator in Baltimore City.~~

~~c. No City office, officer, department, or employee shall enter into a contract to dispose of solid waste at any incinerator after the effective date hereof.~~

~~d.~~b. Nothing contained herein shall abrogate any permittee's responsibility to comply with local, state or federal laws relating to pollution controls and any construction, reconstruction, improvement or replacement necessarily associated therewith.

Appendix D

SEC. 4. AND BE IT FURTHER ORDAINED, That six months before expiration of the 5-year moratorium, the Director of Public Works shall submit to the Mayor and to the City Council a written report indicating the extent of the City's achievement of state-mandated standards for recycling and solid waste stream reduction. In the event that the Director reports that the City has not yet achieved a 40 percent reduction in the City's solid waste stream through source reduction, recycling, and composting by the expiration of the moratorium period, then, without the necessity of further action by the City Council, the moratorium as provided herein shall be automatically renewed for an additional 5-year period or until such time as the Director reports that the 40 percent reduction has been achieved, whichever occurs first.

SEC. 5. AND BE IT FURTHER ORDAINED, That within six (6) months after the effective date of this Ordinance, the City of Baltimore shall include in its ten (10) year solid waste plan, solid waste management programs that rely on safe, economical, and environmentally sound alternatives to the burning of solid waste.

SEC. 6. AND BE IT FURTHER ORDAINED, That any person who violates any provision of this Ordinance or any rule or regulation promulgated by the Director of Public Works pursuant to this Ordinance, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $500.00 nor more than $1,000.00. If a violation is continuing, each day of violation shall constitute a separate offense.

Appendix D

SEC. 7. AND BE IT FURTHER ORDAINED, That if any provision of this Ordinance or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Ordinance which can be given effect without the invalid provision or application, and for this purpose the provisions of this Ordinance are declared severable.

SEC. 8. AND BE IT FURTHER ORDAINED, That this ordinance shall take effect on the 30th day after the date of its enactment.

Certified as duly passed this JUN 18 1992

(Signed) Mary Pat Clarke
President, Baltimore City Council

Certified as duly delivered to His Honor, the Mayor, this JUN 19 1992

(Signed) Leonard F. Wright
Chief Clerk

Approved this AUG 7 1992

(Signed) Kurt L. Schmoke
Mayor, Baltimore City

APPENDIX E — CITY OF BALTIMORE, COUNCIL BILL NO. 846, PROPOSED MAY 9, 1994

EXPLANATION: CAPITALS INDICATE ADDED TO EXISTING LAW.
[BRACKETS] indicate matter deleted from existing law.

CITY OF BALTIMORE
COUNCIL BILL NO. 846 — FIRST READER

BY: Vice President Hall, Councilmembers Branch, Cunningham, Curran, Welch, Dixon, Reeves, Spector, DiBlasi, Stukes
Requested by: Pulaski Company
Address: 300 E. Joppa Road, Baltimore, MD 21286
Tel: 821-1100
Introduced: May 9, 1994
Assigned to: Health and Environment Committee

REFERRED TO THE FOLLOWING MUNICIPAL AGENCIES: City Solicitor, Planning Commission, Dept. of Public Works, Health Department, Dept. of Finance, Board of Estimates, Baltimore Development Corporation

A BILL ENTITLED

AN ORDINANCE concerning

RESOURCE RECOVERY FACILITY
6709 PULASKI HIGHWAY
WASTE-TO-ENERGY FACILITY
1801 ANNAPOLIS ROAD

FOR the purpose of approving the construction of a modern incinerator/resource recovery facility at 6709 Pulaski

Appendix E

Highway and the expansion of the waste-to-energy BRESCO facility at 1801 Annapolis Road pursuant to the recommendation of the Department of Public Works and Ordinance No. 128 of the 1992 Legislative Session.

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That the Mayor and City Council finds that:

Pursuant to Ordinance No. 128 of the 1992 Legislative Session, the Mayor and City Council of Baltimore (the "City") required the Director of Public Works of the City to provide a written report to the City in connection with any proposed construction, reconstruction, replacement or expansion of any incinerator in Baltimore City (subject to certain exclusions).

The Director of Public Works has certified in a written report to the City that the construction of a new, modern state on the art incineration facility (the "New Facility") at 6709 Pulaski Highway, which would replace the five original furnaces now operating at the site, and the expansion of the waste-to-energy facility (the "BRESCO Facility") at 1801 Annapolis Road is necessary to serve the public interest in the efficient, economic, safe and environmentally sound disposal of solid waste.

The City will not be responsible for payment of any of the costs of constructing the New Facility which will utilize modern methods of incineration and pollution control and will operate more efficiently than the existing facility.

Appendix E

The Baltimore metropolitan area is in need of modern, efficient state of the art incineration capacity in order to preserve landfill space throughout the area and to maintain and improve management of solid waste disposal, as well as to promote economic development.

The construction of the New Facility can be undertaken without imposing on the City the obligation to provide a waste stream and/or make Tipping Fee payments to the operator of the New Facility.

The New Facility will reduce the need for additional landfill space in the metropolitan area, will increase the competitive options for disposal of solid waste and will permit the efficient, economic, safe and environmentally sound disposal of solid waste in the Baltimore metropolitan area.

Accordingly, the City has determined, pursuant to Section 3(a) of Ordinance No. 128, to approve the construction of the New Facility and the expansion of the BRESCO Facility as described above.

SEC. 2. AND BE IT FURTHER ORDAINED, That the City approves the construction, reconstruction, replacement and expansion of an incineration facility at 6709 Pulaski Highway and the expansion of the waste-to-energy facility at 1801 Annapolis Road in accordance with, and as generally described in, the written report from the Director of Public Works.

Appendix E

SEC. 3. AND BE IT FURTHER ORDAINED, That all construction, reconstruction, replacement and expansion of the incineration facility at 6709 Pulaski Highway and the waste-to-energy facility at 1801 Annapolis Road shall be carried out in strict accordance with all applicable federal and state environmental laws and regulations.

SEC. 4. AND BE IT FURTHER ORDAINED, That this ordinance shall take effect on the date of its enactment.

APPENDIX F — CERTICATION FOR COUNCIL BILL NO. 846 BY CITY OF BALITMORE'S DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS, DATED MAY 5, 1994

CERTIFICATION

I, George G. Balog, Director of the Department of Public Works for Baltimore City, do hereby make this Certification this 5th day of May, 1994 in accordance with City Council Ordinance 128 of 1994.

1. City of Baltimore Ordinance No. 128 (1992) bars the construction, reconstruction (other than pollution control measures), replacement or expansion of incinerators within Baltimore City; provided however, that if the Director of Public Works certifies in a written report by detail and analysis to the City Council that such construction, reconstruction, replacement or expansion is necessary to serve the public interest in the efficient, economic, safe and environmentally sound disposal of solid waste, the City Council by ordinance may approve such construction, reconstruction, replacement or expansion.

2. In accordance with the requirements of this ordinance, I hereby submit to the Baltimore City Council may recommendation that it consider the replacement of the incinerator located at 6900 Pulaski Highway ("Pulaski Incinerator") and the expansion of the waste-to-energy facility located at 8201 Annapolis Road ("BRESCO"). I have concluded that replacement of the Pulaski Incinerator and expansion of BRESCO are necessary to serve the public interest in the efficient, economic, safe and environmentally sound disposal of solid waste.

Appendix F

3. My analysis and recommendation are based on the considerations discussed below, together with the report submitted by F. Pierce Linaweaver & Associates, Inc. dated March 11, 1994 (Attachment A) and the report prepared by Dave Marc, Engineering Supervisor, Bureau of Solid Waste, dated May 2, 1994 (Attachment B), which I incorporate herein by reference as part of my report to the City Council.

4. The City of Baltimore is bound by compacts executed in 1980 and 1993 to solve the problem of solid waste disposal on a regional basis, together with Anne Arundel, Baltimore, Howard, Harford and Carroll Counties. *See* Northeast Maryland Regional Solid Waste Management Agreement and Amendments dated December 1, 1980; Regional Solid Waste Management Compact for Baltimore City and Anne Arundel, Baltimore, Carroll, Harford and Howard Counties, dated December 31, 1993. These compacts expressly recognize that the problem of solid waste disposal does not respect political boundaries, and if it is to be solved in an efficient, cost-effective and environmentally sound manner, must be addressed by all regional governments acting in cooperation with one another. The 1993 compact requires all signatory jurisdictions to "identify specific multi-jurisdictional projects for implementation and incorporate these projects and programs into each individual 10-year solid waste management plan."

5. Baltimore's contractual obligations are underscored by the Maryland Department of the Environment, which has expressed concern to my department that Baltimore's

draft 10 year solid waste management plan does not provide for adequate regional cooperation in the disposal of solid waste. Unless Baltimore addresses this issue to the satisfaction of MDE, we risk rejection of the plan by the State.

6. In addition to Baltimore's contractual obligations and the concerns expressed by MDE regarding lack of regional cooperation, it is self-evident that a regional solution to the problem of solid waste disposal will benefit Baltimore City. If we can solve the problem of regional waste disposal, we will make the Baltimore metropolitan area more attractive to new business, directly and indirectly increasing revenue to the City.

7. Currently in the Baltimore metropolitan region, there are 900,000 tons of solid waste being disposed of annually in area landfills. This landfill space will be consumed within the next five to ten years, necessitating development of alternate methods of disposal. Moreover, Baltimore County is presently entering into a five year landfill plan which upon expiration would require a permanent solution to their solid waste needs.

8. In addition to landfills there are three options for waste disposal: incineration (preferably in waste-to-energy facilities), composting and recycling. I am of the opinion that all three methods should be used to achieve a reliable, safe and efficient solid waste management plan.

9. It is clear, however, that incineration in waste-to-energy facilities must be the major component in a regional

solution to the waste disposal problem. Such facilities must have the capacity to consume the current quotient of incinerated waste plus the 900,000 tons of waste currently being landfilled. There are two existing incinerators in Baltimore City — the Pulaski Incinerator and BRESCO (which converts the incinerated product into steam and electrical energy). The former is obsolete, however, and the latter does not comply with the Clean Air Act amendments as proposed. If these facilities are to be fully utilized in the future so as to meet the region's need, it will be necessary to demolish the Pulaski Incinerator and erect a replacement facility, and expand BRESCO.

10. The owners of the Pulaski Incinerator have proposed a state-of-the-art waste-to-energy facility, to be constructed and operated without any expense to the City. The owner of BRESCO has likewise proposed renovation of, and construction of an addition to, the existing plant. It is my opinion that these proposals are necessary to serve the public interest in the efficient, economic, safe and environmentally sound disposal of solid waste. I should add, of course, that composting and recycling must also play a significant role in the solution of the regional solid waste disposal problem.

For these reasons, and for the reasons set forth in Attachments A and B hereto, it is my recommendation that the City Council consider construction of the proposed facilities.

s/ George G. Balog
GEORGE G. BALOG
DIRECTOR